Opinion Below.

The opinion of the court below is reported at 253 A.C.A. 117. A copy is attached hereto as an Appendix. Neither the trial court nor the California Supreme Court rendered any written opinion.

Jurisdiction.

1. The date of the judgment sought to be reviewed and the time of its entry is August 2, 1967 (Appx. 1). In accordance with the practice in the appellate courts in California, no separate judgment is promulgated; the judgment of the court is the last sentence of the opinion (Appx. 64): "The judgment as to each defendant is affirmed."

2. The court below denied re-hearing on August 31, 1967. (Order denying rehearing) and the California Supreme Court denied a hearing on September 27, 1967 (Order denying hearing). No extension of time was sought in this Court to petition for a writ of certiorari.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by a writ of certiorari are 28 U.S.C. 1257(3) and 2101(d) and Rule 22(1) of the Rules of this Court.

Question Presented for Review.

Does California Penal Code Section 182(5), particularly the "act injurious to the public health" portion thereof, violate the Due Process Clause of the Fourteenth Amendment because it is vague and indefinite?

Transcript [CT], Appendix thereto [CT Appx], Supplemental Clerk's Transcript [SCT], the Opinion of the court below, the Order of the court below denying re-hearing and the Order of the California Supreme Court denying hearing. The record as certified by the clerk of the court below is not consecutively paginated. Hence, in this petition, the documents will be separately referred to.

Constitutional Provision and Statute Involved.

California Penal Code Section 182(5) (Calif. Code Am. 1873-74, C. 614, P. 426, §14) reads:

> "If two or more persons conspire:
>
> "...
>
> "5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
>
> "...
>
> "They are punishable as follows: ..."

Fourteenth Amendment to the United States Constitution:

> "Section 1....
>
> "(N)or shall any State deprive any person of life, liberty, or property, without due process of law; ..."

Statement of the Case.

As can be understood from the summarization of this lengthy trial (Sept. 27, 1962 [CT 25] to Aug. 2, 1963 [CT 221]) by the court below (Appx. 6 to 42) of the evidence from the standpoint most favorable to the prosecution, the factual issues were fiercely contested, albeit they were mainly concerned with medical questions; *e.g.*, whether a particular treatment or operation was necessary or indicated, or excessive or reasonable, whether a particular individual had the authority under California law to perform the work that he did.[2] Some 32 expert witnesses were called (Appx.

[2]Th s, it was not until the trial herein was in its fifth month, that an appellate court decision was rendered to the effect that licensed chiropractors could not deliver babies [Overt acts 6, 7, 8; CT 4]. (*Crees v. State Board of Medical Examiners*, 213 Cal. App. 2d 195, 214, 28 Cal. Rptr. 621 [1963]).

61). Petitioners by no means concede that they either engaged in, or conspired to engage in, any improper medical practices. Nevertheless, they recognize that this case comes here bottomed on a jury finding that they did. They are not asking this Court to review the evidence.[3]

Petitioners' claim before this Court in this petition is that the backbone statute under which they were prosecuted, the "act injurious to the public health" portion of California Penal Code Section 182(5) is unconstitutionally vague and, therefore, violative of due process of law. Accordingly, a prosecution under it cannot stand. This claim was presented to the trial court by motion to strike from the indictment [RT 20563-A-B] which that court denied [RT 20563-B].

The claim was presented to the court below and ruled upon adversely to petitioner[4] (Appx. 44). After pointing out (Appx. 42) that "(a)s a first ground of claimed prejudicial error requiring a reversal of the judgment against them, defendants contend that that portion of Penal Code 182, subdivision 5, 'To commit any act injurious to the public health, . . .' is void in that it is so vague as to fail to constitutionally clearly define a standard of guilt," the court held (Appx. 44): "The same is true (that they "were were recognized as criminal offenses at common law") as to the words 'to commit any act injurious to the

[3]Almost 22,000 pages of reporters transcript [RT] and some 382 exhibits—mostly medical.—This material is not now being forwarded to this Court. It is, of course, available to the Court at any time.

[4]The first point of petitioners' opening brief below (pp. 97-108) was: "California Penal Code 182(5) is unconstitutionally vague."

public health.'" And the court held (Appx. 44) as equally applicable to these words, the holding of the California Supreme Court (as to the "pervert or obstruct justice, or the due administration of the laws" portion of the subdivision) in *Calhoun v. Superior Court,* 46 Cal. 2d 18, 31, 291 P. 2d 474: 'There is no merit in the contention that subdivision 5 of Section 182 of the Penal Code is unconstitutional.'"

The claim was presented in similar phraseology (see f.n. 4, *supra*) to the California Supreme Court in the petition for hearing in that court (pp. 23-24) and, by the denial of that petition (Order Denying Hearing), ruled upon adversely to petitioners by that court.

Reasons for Granting the Writ and Argument Amplifying Same.

1. In *Musser v. Utah,* 333 U.S. 95 (1948), this Court, *sua sponte* (p. 96), suggested the unconstitutionality of a Utah statute virtually identical with California's Penal Code 182(5).[5] Accordingly, this Court vacated the State Supreme Court's judgment which had affirmed a criminal conviction under the section for conspiring "to commit acts injurious to public morals," and remanded "for proceedings not inconsistent herewith." (p. 98).[6]

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[5]The Utah statute contained a prohibition against an act "injurious to trade and commerce," which is absent from California's, and the language as to justice and the administration of the laws read: "for the perversion or obstruction of justice or the due administration of the laws," rather than, as does California's, "to pervert or obstruct" etc.

[6]The dissenting justices would have reversed outright (p. 102).

The "not inconsistent herewith," of course, had reference to what this Court had said about the statute (pp. 96-97):

> "It is obvious that this is no narrowly drawn statute. . . . Standing by itself, it would seem to be a warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. . . . Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

On the remand, the Utah Supreme Court said it was "unable to place a construction on these words which limits their meaning beyond their general meaning" and held the statute "void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution." (*State v. Musser*, 118 Utah 537, 539; 223 P. 2d 193, 194 [1950])

In the instant case, the court below, without gainsaying the vagueness of the statute, upheld it on the ground that the phrase "injurious to the public health," "was a well defined phrase at common law" (Appx. 48) and "(was) recognized as (a) criminal offense . . . at common law," (Appx. 44) and, therefore, the statute

avoided the "void for vagueness doctrine." As we shall show, neither of these contentions is correct. The decision below is in conflict both with the decision of this Court in *Musser* and at least one other decision of this Court, as well as with the decisions of other State supreme courts, in addition to Utah's, which have considered similar statutes.

In *Gelling v. Texas,* 343 U.S. 960 (1952), this Court held as unconstitutional the standard, "prejudicial to the best interests of the people of said city." This is not too different from the statute at bar.

In *State v. Gallegos,* 384 P. 2d 967 (Wyo., 1963), the statute made it unlawful with respect to a child under the age of 19 years, "to cause, encourage, aid or contribute to the endangering of the child's health, welfare, or morals." Holding the statute unconstitutionally vague and citing, *inter alia, Lanzetta v. New Jersey,* 306 U.S. 451, 453, the Wyoming Supreme Court said (p. 968) that "it would be utterly impossible to know just what acts are and what acts are not forbidden by the statute under which the defendant is charged." The Court did not question that statutes directed to the protection of children from all types of abuses which jeopardize their health, welfare or morals are essential, but said (*ibid.*), "(h)owever, criminal statutes cannot be couched in terms so vague and indefinite as to deny due process to an accused."

Again, in *Ex Parte Andrew Jackson,* 45 Ark. 158 (1885), the Court held as unconstitutionally vague, a

statute virtually identical with the one at bar, which made it a misdemeanor to "commit any act injurious to the public health, or public morals, or to the perversion or obstruction of public justice, or to the due administration of the laws." Said the Court (p. 164):

> "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncracies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of social reform, changing with all the fluctuations of moral sentiment. The law is simply null. The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act of crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

True, the facts in the case involved the "morals" phrase; but "health" is no more certain than "morals."

2. The court below felt that "injurious to the public health," was a common law crime and had a well defined common law meaning. Both these premises are in error and in any event do not obviate the constitutional defect.

(a) In the first place, the presence of a so-called common law crime does not dispose of the vagueness question. This Court has made this clear. Thus, in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), in re-

versing a conviction for the common law offense of breach of the peace, the Court said (310 U.S. at 308)

> ". . . [T]he judgment is based on a common law concept of the most general and undefined nature . . .
>
> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order or tranquility . . . Here we have a situation analagous to a conviction under a *statute* sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." (Emphasis added).

And, in *Ashton v. Kentucky,* 384 U.S. 195 (1966), this Court again emphasized that the Constitution takes precedence over the common law. Citing a number of cases, including *Cantwell, supra,* the Court agreed (384 U.S. at 198) with the dissenters in the court below:

> "'. . . since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.'".

(b) In the second place, that the Duke of York set up laws for the colony of New York and that other colonies had laws regulating the practice of "chir-

urgions" (or chyrurgions) "mid-wives" and "physicians" (or physitions) hardly justifies a conclusion that the performance of an "act injurious to the public health" was either a crime or a "well defined phrase at common law." (Appx. 48).

The court below says (Appx. 48):

> "The term 'any act injurious to the public health' was a well defined phrase at common law and specifically was directed toward (1) quarantine violations, and (2) unnecessary operations and unlicensed practice of medicine which had for their motives avarice and greedy expectation of financial gain or other sinister purposes."

But, the court sets forth no authority to support this assertion. (Of course the phrase "other sinister purposes" does not assist here; it too, runs afoul due process requirements.) The bald fact is that nowhere in the common law history which the court reviews (Appx. 45 to 49) and which, presumably is the basis for its statement, does the phrase "act injurious to the public health," or a similarity thereto, appear.

We submit that it is improper to strain at these common law statutes, without even citation of case authority to give them any gloss at all, to give them the meaning "act injurious to the public health."

But even if the colonial statutes meant what the court below says they meant, it is so only because the statutes said so. This is hardly a common law meaning to the words, "act injurious to the public health." If those are the meanings the California legislature intended, it could easily have said so. Indeed, it has, in other statutes: Health and Safety Code 2600-2603

(violations of quarantine orders); Business and Professions Code 2141 (practicing medicine without a license). Thus, it appears that the legislature was not satisfied that the words being challenged here mean what the court below says they do. Else it would not have enacted the more particularized penal statutes mentioned. It is not to be presumed that the California legislature engages in idle talk when it legislates. (*Consolidated Rock Products Co. v. California,* 57 Cal. App. 2d 959, 965 [1943]). It obviously meant "act injurious to public health" to mean something other than quarantine violations and practicing medicine without a license—what, is not clear. And so, just as in *Ashton, supra,* 384 U.S. at 198, the "elements of the crime" of committing "an act injurious to public health" "are so indefinite and uncertain that it should not be enforced as a penal offense in" California.

To rule that the California citizen of the 1960's should know that the State's "act injurious to the public health" statute means what the colonial laws against "chirurgions" meant, is "as much a trap for the innocent as the ancient laws of Caligula." (*United States v. Cardiff,* 344 U.S. 174, 176 [1952]). With due respect, the reasoning of the court below is as much a denial of due process as that suggested by this provision of a former Chinese Penal Code:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows." (*Chicago & N.W. Ry. Co. v. Dey,* 35 Fed. 866, 876 (CC SD Iowa 1888), *Tozer v. United States,* 52 Fed. 917, 920 (CC Ed. Mo. 1892).)

3. Recognizing that, in truth, the statute is vague on its face and "leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foresee and the result of which no one can foreshadow or adequately guard against," (*United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 [1951]), the court below nevertheless rejects (Appx. 50) petitioners' argument that the statute must fall because it encompasses conduct no one can tell is violative of the statute.[7] The court does so on the ground that the constitutionality of a statute cannot be attacked on the basis of hypothetical situations not before the court, and also (Appx. 51) on the ground that the transcript of the Grand Jury proceedings was furnished petitioners, thus remedying any vagueness deficiencies. In effect, the

[7]Petitioners asked in their opening brief below (pp. 98-99): What is "any act injurious to public health?" In the light of present day medical knowledge, does the Section prohibit the sale of cigarettes? (*cf. State v. Gallegas*, 384 P. 2d 967, 968). Does the refusal of a hospital district to admit a qualified doctor to its staff to treat his patients on the ground that he is "not temperamentally suitable for hospital staff practice" amount to an act injurious to public health under the statute? (See *Rosner v. Eden Township Hospital District*, 58 Cal. 2d 592). Is the use by a religious sect of a narcotic, the possession of which is prohibited by Health and Safety Code 11500, an act injurious to public health and so prohibited by the statute? (See *People v. Woody*, 61 Cal. 2d 716). Are the presentation of a football game in 110° heat or the failure to provide drinking water in the Dodger Baseball Stadium, acts made criminal by the statute as being injurious to public health? Are driving or manufacturing or selling automobiles without a smog control device acts injurious to public health and thus criminally punishable under the statute? Does the statute prohibit, as criminal, the use of insecticides or pesticides on fruits and vegetables? Is the changing of linen in a hospital every other day, and not every day, an act injurious to public health? Is the refusal of housing developers to sell to Negroes, thus causing them to live in ghettoes with the resulting "disease, crime and immorality" act injurious to public health? (See *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 471).

court is saying that a vague statute cannot be attacked on its face.

This is clearly not the constitutional law. In the free speech field, there can be no doubt of the error of the court's assertion. (See *e.g., Keyishian v. Board of Regents,* 385 U.S. 589, 599 [1967]). The same thing is true as to statutes involving conduct, for, "[t]he vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited." (*United States v. Cardiff, supra,* 344 U.S. at 176). As this Court said in *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939) (a non-free speech "vagueness" case):[8]

> "If on its face the challenged provision is repugnant to the due process clause, specification of the details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

The statute at bar falls precisely within these words of this Court in *United States v. Reese,* 92 U.S. 214, 221 (1876):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. . . ."

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[8]See, also, the cases cited at footnote 1 in *Ashton v. Kentucky,* 384 U.S. 195, 200.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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